Supreme Court, U. S.
FILED
OCT 10 1978
MICHAEL RODAK, JR., CLERK

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A. Richard Gear
HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71201

Attorney for Respondent

October, 1978

NO. 78-5072

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY DAVIS, Petitioner

v.

OTTO E. PASSMAN, Respondent

RESPONSE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respondent, Otto E. Passman, having been requested by the Court by letter of September 11, 1978, to respond to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner, Shirley Davis, hereby files this response in opposition and prays that the Petition for a Writ of Certiorari be denied.

QUESTIONS PRESENTED

1. Whether a former Congressional employee in a non-competitive position has a cause of action under the fifth amendment to the United States Constitution for money damages against a former Congressman for an alleged discriminatory discharge.

2. If so, whether the Speech or Debate Clause of the United States Constitution and related issues involving considerations of political question non-justiciability and separation of powers bar recovery on the basis that Congressional personnel actions are thereby cloaked with immunity from interference by the judiciary.

THE DECISION OF UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IS CORRECT AS TO THE FIFTH AMENDMENT ISSUES IN THIS PARTICULAR CASE AND DOES NOT WARRANT CONSIDERATION BY THIS COURT.

The holding of the United States Court of Appeals for the Fifth Circuit is a narrow holding which arises from exceedingly unique and limited facts, which, when viewed reasonably, does not essentially conflict with other decisions of the U.S. Circuit Courts of Appeals, and does not have the import to warrant consideration by this Court by the grant of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit held that an action for money damages against a former Congressman based upon allegedly discriminatory discharge is not implied from the Due Process Clause of the Fifth Amendment of the Constitution. This holding was partially predicated upon an analysis of the "exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination" found in Section 717 of Title VII of the Civil Rights Act of 1964,[1] as amended in 1972. And, indeed, this case is unique in that the right to damages is claimed by one who occupies a position specifically exempted from coverage of Title VII and who has historically been subject to discharge with or without cause - a federal employee in a non-competitive position on a Congressman's personal staff. In this case, unlike other actions based upon a Bivens[2] rationale, Congress has spoken rather clearly in its creation of an exclusive remedial scheme and has determined that employees such as petitioner herein in the non-competitive units of legislative (and judicial) branches shall not have the rights available to other federal employees to participate in that scheme. The Fifth Circuit noted that "Congress cannot have intended to deal

---

[1] Section 717 of the Civil Rights Act prohibits discrimination only ". . .in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service." (Emphasis supplied.)

[2] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

ore generously with those in Davis' position, from whom it eliberately withheld protection."[3] Indeed, Congress had in ears past enacted 2 U.S.C.A. §92 which provided for removal of congressman's personal staff "at any time with or without ause."

The point to be emphasized here is that the Fifth ircuit's holding is so narrow and so tightly bound to such unique acts involving the will of Congress that the decision does not trike a blow at the evolutionary process of Bivens as it is eveloping in various Circuit Courts of Appeals. Respondent, herefore, respectfully submits that this case is not the proper ehicle for this Court to use for an articulation of the limits of Bivens cause of action. And indeed, this case affects only congressional employees in the non-competitive service whose llegedly discriminating employers are not in office. . ."[4] Further, he Fifth Circuit specially noted that:

> "Denying an implied cause of action for money damages does not render meaningless any constitutional rights of congressional employees. A plaintiff might still seek equitable relief when the employer remained in office. . ." (Emphasis supplied)[5]

he clear impact of this case thus runs only to former non-ompetitive service congressional employees whose employers are o longer in office and who seek money damages over their removal. he Fifth Circuit was not called upon to delineate the rights of ongressional employees against congressmen still in office and did ot do so other than to suggest that equitable relief was available hen the employer was still in office. Thus, consideration by this ourt is not warranted as the affected parties are few.

---

[3] See Appendix A, page 6. (References are made herein to he appendices attached to the Petition for a Writ of Certiorari)

[4] Appendix A at 8.

[5] Appendix A at 8.

In view of the clear Congressional mandate to thus exempt non-competitive congressional employees, it is submitted that the Fifth Circuit could not have properly found otherwise on these very narrow facts than to deny money damages. The Fifth Circuit has by its decision placed a limitation on Bivens-type actions under the fifth amendment insofar as the rights to damages of former non-competitive service employees of former congressmen are concerned. Such a limitation, on these facts, in the correct result in this case for the reasons set forth above and in the Fifth Circuit's opinion.

Moreover, even if one were favorably disposed toward implying fifth amendment causes of action for damages under the Bivens rationale, the result in this case is a proper delineation of the limits of that rationale in view of the peculiar facts of this case and the clear intent of Congress regarding the status of non-competitive service congressional employees and the other factors as expressed by the Fifth Circuit in its analysis. Accordingly, for this reason, consideration by this Court is not warranted.

The Fifth Circuit by its decision en banc in effect refused to take responsibility upon the federal judiciary for policing the internal personnel problems of the Congress, another branch of the federal government. Respondent submits that this non-interference is a salutary result which should remain undisturbed. It must not be forgotten that this is not the typical Bivens-based alleged fifth amendment action - this action seeks to involve the Courts in the internal employment relationships of a coordinate branch when that branch has already substantively defined the rights of the parties.

Respondent submits that the decision below was correct and that for the foregoing reasons, the petition for certiorari should be denied.

HE SPEECH AND DEBATE CLAUSE AND THE RELATED ISSUES OF NON-JUSTICIABLE POLITICAL QUESTION AND SEPARATION OF POWERS PROTECT ESPONDENT FROM JUDICIAL INQUIRY INTO THE HIRING AND FIRING OF ONGRESSIONAL STAFF MEMBERS.

The rehearing en banc was ordered by the Fifth Circuit the basis of Respondent's motion which sought rehearing on the ssues of Speech and Debate Clause Immunity and whether a non-sticiable political question existed. Oral argument at the ehearing en banc was presented by Petitioner and Respondent oncerning these issues. The Fifth Circuit majority en banc decided he issues of the case in the fifth amendment context discussed upra but made little reference to the issues for which the rehearing as convened. If this Court were to grant certiorari concerning the ifth amendment issues and were to rule against the Respondent on hose issues, Respondent, of course, will assert as a defense that a result of immunity conferred upon congressmen by the Speech nd Debate Clause and the political nature of the question, espondent still is not liable to Petitioner for her discharge.

Respondent submits that the work of Congressional aides such an integral part of the legitimate legislative function hat a Congressman's decision to hire or discharge a legislative taff member is itself a legislative act which is immune under the peech and Debate Clause from executive or judicial interference.

The importance of the legislative functions of these ides has been previously recognized by this Court in Gravel v. nited States, 408 U.S. 606, at 617:

> ". . .it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of Congress to perform their legislative tasks without the help of aides or assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause -- to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 US 169, 181, 15 L Ed 2d 681, 86 S Ct 749 (1966) -- will inevitably be diminished and frustrated." (Emphasis supplied)

Respondent asserts that a Congressman should be free to choose his own "alter ego" without being questioned outside of the Halls of Congress by the judiciary. The relationship of a congressman to his staff[6] is thus so intimately involved with the immune legislative function that a congressman's personnel decisions are themselves protected by the immunity conferred under the Speech and Debate Clause of the Constitution.

Intertwined with Speech and Debate Clause immunity is the related assertion that judicial scrutiny of congressional personnel actions involve ". . .policy determinations of a kind clearly for non-judicial discretion;" Baker v. Carr, 369 U.S. 186, at 217 (1962). Such judicial intervention in the internal workings of Congress flies in the face of the doctrine of separation of powers within the federal government and itself is a basis for dismissal of the complaint in this case.

Respondent submits that its legal position as to Speech and Debate Clause immunity coupled with political question non-justiciability and the doctrine of separation of powers is sound and meritorious. Inasmuch as Respondent will ultimately prevail on these bases the petition for certiorari should be denied.

Further, since the time of the oral argument of this case before the Fifth Circuit en banc in September, 1977, a Report of the Committee on Governmental Affairs in the United States Senate

---

[6] It should be noted that Petitioner and Respondent are not in agreement in this action as to the importance or nature of Petitioner Davis' job on the staff of former Congressman Passman. Respondent asserts that her duties encompassed a legislative function role while Petitioner describes her role as "an office supervisor" with no relation to the legislative or policy aspects of Respondent's office. See Petition for Certiorari at 21, 23.

has issued reporting favorably on an original resolution (S. RES. 431) to implement the provisions of Rule L of the Standing Rules of the Senate, which will become effective January 3, 1979. Rule L states:

> "No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof -
> (a) fail or refuse to hire an individual;
> (b) discharge an individual; or
> (c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment
> on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap."

Senate Resolution 431 [Report No. 95-729] attached hereto as Appendix F is on the Senate's calendar for adoption at the time of this writing. Senate Resolution 431 provides an internal or legislative procedure for processing complaints of discrimination which arise under Rule L. It is clear that Congress is moving rapidly toward providing its own remedies without judicial assistance and that the wisdom of a policy of judicial restraint from interference in the internal personnel problems of Congress evidenced by the Fifth Circuit's decision below is a weighty consideration which warrants denial of the petition for certiorari in this case.

CONCLUSION

Respondent respectfully submits that for the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

HUDSON, POTTS & BERNSTEIN
Post Office Drawer 3008
Monroe, Louisiana 71201

By: A. Richard Gear
A. Richard Gear

CERTIFICATE OF SERVICE

I certify that a copy of the Response in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon the counsel of record for petitioner, Ms. Sana F. Shtasel and Mr. Peter Barton Hutt, at their address, 888 Sixteenth Street, N.W., Washington, D.C. 20006, by mailing same, certified mail, return receipt requested in the United States Mail.

Monroe, Louisiana, this 10th day of October, 1978.

s/ A. Richard Gear
A. Richard Gear

APPENDIX F

95TH CONGRESS
2D SESSION

S. RES. 431

[Report No. 95–729]

IN THE SENATE OF THE UNITED STATES

APRIL 7 (legislative day, FEBRUARY 6), 1978

Mr. GLENN (for Mr. RIBICOFF), from the Committee on Governmental Affairs reported the following resolution; which was referred to the Committee on Human Resources pursuant to section 310 of Senate Resolution 110, Ninety-Fifth Congress, first session, for not to exceed 60 days

RESOLUTION

To implement rule L of the Standing Rules of the Senate, relating to employment practices.

Resolved, That this resolution may be cited as the "Lee Metcalf Fair Employment Relations Resolution".

PURPOSE

SEC. 2. It is the purpose of this resolution to implement the provisions of rule L of the Standing Rules of the Senate, which will become effective on January 3, 1979, by establishing a Senate Fair Employment Relations Board, a Senate Fair Employment Relations Office, and procedures for hearing and settling complaints alleging violations of rule L by Members, officers, and employees of the Senate.

DEFINITIONS

SEC. 3. For purposes of this resolution, the term—

(1) "Board" means the Senate Fair Employment Relations Board established by section 101;

(2) "Office" means the Senate Fair Employment Relations Office established by section 201;

(3) "Director" means the Director of the Senate Fair Employment Relations Office established by section 201;

(4) "employee of the Senate" means any individual who is an employee of the Senate, or is treated as an employee of the Senate, for purposes of the Senate Code of Official Conduct;

(5) "complainant" means an employee of the Senate or other individual who applies for a position in the Senate and who files a complaint under section 302;

(6) "respondent" means a Member, officer, or employee of the Senate against whom a complaint is filed under section 302;

(7) "office of the Senate" includes the office of a Senator;

(8) "rule L" means rule L of the Standing Rules of the Senate; and

(9) "supervisor" has the meaning given to it by paragraph 12 of rule XLV of the Standing Rules of the Senate.

TITLE I—FAIR EMPLOYMENT RELATIONS BOARD

ESTABLISHMENT

SEC. 101. (a) There is established an office of the Senate to be known as the Senate Fair Employment Relations Board. The Board shall consist of six members, selected from among individuals in the private sector, who have a demonstrated commitment to fair employment relations—

(1) three of whom shall be appointed by, and may be removed by, the Majority Leader of the Senate with the approval, by majority vote, of the Conference of the Majority; and

(2) three of whom shall be appointed by, and may be removed by, the Minority Leader of the Senate with the approval, by majority vote, of the Conference of the Minority.

No individual who has served as a Member, officer, or employee of the Senate or the House of Representatives or as an officer or employee of the Congress may be appointed as a member of the Board during the three-year period following the termination of his or her service as such a Member, officer, or employee.

(b) Each member of the Board shall be appointed for a term of four years commencing with the day after the expiration of the term of his or her predecessor, except that of the members first appointed—

(1) one member appointed by the Majority Leader and one member appointed by the Minority Leader (as designated by the respective Leaders) shall be appointed for a term of two years commencing on the day on which this resolution is agreed to; and

(2) two members appointed by the Majority Leader and two members appointed by the Minority Leader (as designated by the respective Leaders) shall be appointed for a term of four years commencing on such day.

Any member appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired portion of such term. Any member serving at the expiration of a term may continue to serve until his or her successor is appointed.

(c) The Board shall elect one of its members to serve as Chairperson.

(d) A quorum of the Board shall consist of four members, but no action of the Board in performing the functions and duties specified in paragraphs (1) and (3) of section 104 (a) or in appointing or removing the Director under section 201 may be taken except with the concurrence of a majority of the members holding office.

(e) The Board is authorized to delegate to the Chairperson or any other member of the Board the authority to

approve on behalf of the Board those actions of the Director which require approval of the Board under sections 201, 202, and 203.

COMPENSATION

SEC. 102. Each member of the Board shall receive compensation equal to the daily equivalent of the salary of the Secretary of the Senate for each day on which the member is engaged in performing his or her duties as a member of the Board and in traveling from or to his or her home to attend meetings of the Board. Each member shall also be entitled to reimbursement for transportation costs and actual travel expenses while so traveling in the same amounts as are payable to employees of the Senate.

MEETINGS; ADMINISTRATIVE SERVICES

SEC. 103. (a) The Board shall meet at least once every three months and shall also meet upon call of the Chairperson or of a majority of the members holding office. Notice of any meeting of the Board shall be given to all members at least three days prior to such meeting.

(b) All necessary administrative services required by the Board shall be furnished by the Office.

FUNCTIONS AND DUTIES

SEC. 104. (a) It shall be the function and duty of the Board—

(1) to establish and publish policies and guidelines for the implementation and enforcement of rule L;

(2) to supervise the actions of the Director and the operations of the Office through the Director; and

(3) to hear and determine complaints alleging violations of rule L in accordance with title III.

(b) In order to carry out its functions and duties under title III, the Board is authorized to appoint and fix the compensation (subject to applicable limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such number of hearing examiners as may be necessary. Any such hearing examiner may be appointed on a temporary (not to exceed one year) or intermittent basis and any hearing examiner so appointed may be paid, for each day on which he or she performs services, not in excess of the daily equivalent of the highest salary which may be paid to a hearing examiner appointed on a permanent basis.

(c) The Board may adopt such regulations as it determines necessary to carry out its duties and functions.

PAYMENT OF EXPENSES

SEC. 105. The expenses of the Board (including compensation of members of the Board and hearing examiners) shall be paid from the contingent fund of the Senate pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and ex-

penses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers approved by the Chairperson, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE II—SENATE FAIR EMPLOYMENT RELATIONS OFFICE

ESTABLISHMENT

SEC. 201. (a) There is established an office of the Senate to be known as the Senate Fair Employment Relations Office. The Office shall be headed by a Director who shall be appointed by, and shall serve at the pleasure of, the Board. The Director shall receive compensation at an annual rate fixed by the Board but not in excess of the highest rate of compensation which may be paid to an employee of a committee of the Senate under section 105(e)(3)(A) of the Legislative Branch Appropriations Act, 1968, as amended and modified (2 U.S.C. 61–1).

(b) The Director, with the approval of the Board, shall appoint and fix the compensation (subject to applicable salary limitations imposed by or pursuant to law on the salaries of employees of the Senate) of such personnel as may be necessary to carry out the duties and functions of the Office. All personnel of the Office shall be appointed without

regard to political affiliation and solely on the basis of their fitness to perform their duties.

(c) In carrying out the functions and duties of the Office, the Director, with the approval of the Board, may procure the temporary (not to exceed one year) or intermittent services of experts or consultants or organizations thereof by contract as independent contractors, or, in the case of individual experts or consultants, by employment at rates of pay not in excess of the daily equivalent of the highest rate of compensation which may be paid to employees of the Office appointed on a permanent basis.

(d) The Director may prescribe the duties and responsibilities of the personnel of the Office, and delegate to them authority to perform any of the functions and duties imposed on the Office or on the Director, with the exception of the submission of reports under sections 302(b) and (c).

FUNCTIONS AND DUTIES

SEC. 202. (a) In addition to the functions and duties imposed on it by title III, the Office shall (1) develop procedures to implement the policies and guidelines of the Board to encourage full compliance with rule L by all Members, officers, and employees of the Senate and (2) perform such other functions as may be prescribed by the Board.

(b) The Office shall gather and maintain information with respect to each category of employees and individuals

who are afforded equal employment opportunity by rule L, including, to the extent possible, information relating to individuals who apply for positions on the staffs of committees and offices of the Senate. The Office shall also gather and maintain information with respect to the employment practices of committees and offices of the Senate. Each year the Director, with the approval of the Board, shall submit to the Senate a report with respect to the information gathered under this subsection. Each report after the first report shall contain a comparison and evaluation of the data contained in such report with the data contained in prior reports.

(c) Upon the request of any committee or office of the Senate, the Office shall submit to such committee or office its recommendations for improvements in the employment practices of such committee or office. The Office shall assist the placement office with the development of procedures to collect and disseminate applications submitted by individuals from categories which are afforded equal employment opportunity by rule L.

(d) The Office shall review the procedures and practices for receiving, hearing, and settling complaints of alleged violations of rule L under title III and make recommendations regarding the continuation or improvement of such procedures. Not later than January 3, 1981, the Director, with the approval of the Board, shall submit

to the Senate the results of such review, together with his or her recommendations. Such report shall be referred to the appropriate committee or committees of the Senate which, within one hundred and eighty days after the date of referral, shall submit their recommendations on the report to the Senate.

SUPPLIES; PAYMENT OF EXPENSES

SEC. 203. (a) The Director is authorized to procure such books, stationery, and other supplies as may be necessary for the proper performance of the functions and duties of the Office. The Architect of the Capitol and the Sergeant at Arms of the Senate shall furnish the Office such furniture and office equipment as may be necessary.

(b) The expenses of the Office (including salaries) shall be paid from the contingent fund of the Senate pursuant to appropriations made to the contingent fund for such purpose. Until funds are first so appropriated, such salaries and expenses shall be paid from the contingent fund out of funds appropriated for "Miscellaneous Items". Such salaries and expenses shall be paid out of the contingent fund upon vouchers signed by the Director, and approved by the Board, except that vouchers shall not be required for the disbursement of salaries of employees paid at an annual rate.

TITLE III—COMPLAINTS OF VIOLATIONS OF EQUAL EMPLOYMENT OPPORTUNITY

PART A—COUNSELING AND CONCILIATION

COUNSELING AND ASSISTANCE

SEC. 301. (a) Any employee of the Senate, or other individual who applies for a position in the Senate, who believes that he or she is being or has been discriminated against in violation of rule L may make a request to the Office for counseling and assistance. The Director shall designate employees of the Office to serve as counselors. Counselors shall advise employees and other individuals as to their rights under rule L and furnish such other advice and assistance as may be requested with respect to the application of rule L. No written statement shall be required for an employee or other individual to receive counseling and assistance under this section.

(b) Counseling under this section must be requested within sixty days of the action giving rise to the alleged discrimination, unless the Director authorizes counseling after such sixty-day period or unless the alleged discrimination is based upon a continuing practice or policy.

INFORMAL COMPLAINTS AND CONCILIATION

SEC. 302. (a) Any employee of the Senate, or other individual who applies for a position in the Senate, who

believes that he or she is being or has been discriminated against in violation of rule L may, within twenty days after counseling is requested under section 301, file an informal complaint with the Director. Such an informal complaint may be filed only against an individual whom the complainant believes actually participated in the alleged violation or the individual who has authority to remedy the alleged violation, or both. Such an informal complaint shall consist of a brief written statement of the alleged violation. The Director shall furnish a copy of such informal complaint to the respondent and, if the respondent is an officer or employee, shall furnish a copy of such informal complaint to the respondent's supervisor.

(b) Upon the filing of an informal complaint under subsection (a), the Director shall collect information concerning the alleged violation. Within forty-five days after the date of filing, the Director shall submit a report to the Board with respect to such informal complaint and shall furnish copies of such report to the complainant and respondent and, if the respondent is an officer or employee, shall furnish a copy of such report to the respondent's supervisor.

(c) (1) If as a result of the information collected under subsection (b), the Director determines that there is no reason to believe that a violation of rule L may have occurred, he or she shall so state in the report submitted pursuant to

such subsection, together with his or her reasons for such determination.

(2) If as a result of the information collected under subsection (b), the Director determines that there is reason to believe a violation of rule L may have occurred, he or she shall attempt to resolve such violation by informal means. If an informal agreement between the complainant and respondent is reached, the Director shall so state in the report submitted pursuant to such subsection. If an informal agreement between the complainant and the respondent is not reached, the Director shall include his or her findings in the report submitted pursuant to such subsection.

PART B—FORMAL COMPLAINTS AND HEARINGS

FILING OF FORMAL COMPLAINTS

SEC. 311. (a) If the report of the Director under section 302 with respect to an informal complaint sets forth the Director's determination that there is reason to believe that a violation of rule L may have occurred but no agreement has been reached between the complainant and the respondent, then the complainant may, within thirty days after the date on which such report is submitted to the Board, file a formal complaint with the Board. A formal complaint shall be under oath and shall be in such form and set forth the basis of the complaint in such detail as the Board may prescribe by rule or regulation.

(b) If the report of the Director under section 302 sets forth the Director's determination that there is no reason to believe that a violation of rule L may have occurred, the complainant may request the Board to review such determination. Such request shall be in writing and shall be made within thirty days after the date on which such report is submitted to the Board. The Board shall complete its review within thirty days after such request is made and if it determines that there is reason to believe that a violation of rule L may have occurred, the complainant may, within thirty days after the date of the Board's determination, file a formal complaint under subsection (a).

HEARINGS

SEC. 312. (a) Each complaint filed under section 311 shall be assigned by the Board (or by such individual as the Board may designate) for a hearing by a hearing examiner appointed under section 104(b). The hearing examiner shall cause a copy of the complaint to be served on the respondent and, if the respondent is an officer or employee, shall furnish a copy of the complaint to the respondent's supervisor. The respondent shall be entitled to file, within ten days after such service, or within such longer time as the Board may permit, a formal answer to such complaint. A formal answer shall be under oath and shall be in such form as the Board may prescribe by rule or regulation.

(b) The hearing on a complaint shall be conducted expeditiously with a record in transcript form. Upon conclusion of the hearing, the hearing examiner shall submit to the Board a report containing his or her findings and recommendations (if any) for remedial action.

DECISIONS BY THE BOARD

SEC. 313. (a) The Board shall review the transcript and the findings and recommendations of the hearing examiner with respect to each complaint filed under section 311. If the Board finds that the hearing is incomplete, it may remand the case to the hearing examiner. The Board shall render a decision in each case within sixty days after the filing of the formal complaint, unless prior thereto the complainant and the respondent reach an agreement disposing of such case.

(b) If the Board determines in any case that there is or has been a violation of rule L, its decision shall include an order for such remedial action as it determines appropriate, except that no remedy may be ordered which the Board determines would result in undue benefit or undue hardship to the complainant or the respondent.

RULES; PROCEDURE

SEC. 314. The Board shall prescribe such rules or regulations as it determines proper to carry out the provisions of this part, including rules or regulations relating to the conduct

of hearings and proceedings under this part and the rights and privileges of complainants and respondents in such hearings and proceedings. The Board shall publish all rules and regulations which it proposes to prescribe under this section and shall give interested persons an opportunity to comment thereon.

PART C—APPEALS TO SELECT COMMITTEE ON ETHICS

APPEALS

SEC. 321. (a) A complainant or respondent who is aggrieved by a decision or order of the Board under section 313 may, within thirty days after the decision or order is issued, appeal the decision or order to the Select Committee on Ethics.

(b) Within sixty days after an appeal is filed under subsection (a), the Select Committee on Ethics shall render its decision with respect to such appeal. Such decision may affirm the decision or order of the Board, reverse such decision or order in whole or in part, or remand the case to the Board for further proceedings. In any case in which the select committee reverses a decision or order of the Board in whole or in part, if the select committee determines that there is or has been a violation of rule L, it may order such remedial action as it determines appropriate, except that no remedy may be ordered which the select committee determines would

result in undue benefit or undue hardship to the complainant or the respondent.

PROCEDURE

SEC. 322. The Select Committee on Ethics shall prescribe such rules or regulations as it determines proper to carry out the provisions of section 321.

PART D—MISCELLANEOUS

REMEDIES

SEC. 331. (a) The remedial actions which may be specified in an order issued by the Board under section 313 or by the Select Committee on Ethics under section 321 include, but are not limited to—

(1) if the discrimination is failure or refusal to hire an individual, a requirement that such individual be employed within a specified period of time, or the payment of a specified sum to such individual, or both;

(2) if the discrimination is discharging an individual, a requirement that such individual be reemployed within a specified period of time, or the payment of a specified sum to such individual, or both;

(3) if the discrimination is with respect to the promotion or compensation of an individual, a requirement that such individual be promoted to or compensated at a specified level within a specified period of time, or the

payment of a specified sum to such individual, or both; and

(4) if the discrimination is with respect to terms, conditions, or privileges of employment of an individual, a requirement that such terms, conditions, or privileges be changed within a specified period of time, or the payment of a specified sum to such individual, or both.

(b) Any payment ordered to be made to an individual under an order issued by the Board or the Select Committee on Ethics shall be made out of the contingent fund of the Senate upon a voucher signed by the Chairperson of the Board or the chairman of the select committee, as the case may be.

(c) No complainant or witness in a proceeding under this title shall be subject to any reprisal, interference, intimidation, or coercion by any Member, officer, or employee of the Senate as a result of filing such complaint or appearing as such a witness.

RECORDS; CONFIDENTIALITY OF INFORMATION

SEC. 332. (a) The records, files, and papers relating to each informal complaint filed under section 302, each formal complaint filed under section 311, and each appeal taken under section 321 shall constitute papers of the Senate and shall be retained for at least five years. All such information, including the existence of a case, shall be main-

tained on a confidential basis, and, except as provided in subsection (b) or as otherwise ordered by the Senate, such information shall not be disclosed to any person (other than the complainant and the respondent) and shall not be available for inspection other than by the Board, the Director and employees of the Office, and, with respect to any appeal taken under section 321, the Select Committee on Ethics.

(b) Decisions and orders of the Board under section 313 and decisions and orders of the Select Committee on Ethics under section 321 shall be made public.

COOPERATION BY COMMITTEES AND OFFICES

SEC. 333. Each committee and office of the Senate shall cooperate with the Board, the Office, and the Select Committee on Ethics in order that the functions and duties imposed on them by this resolution may be properly and effectively carried out.

95TH CONGRESS
2D SESSION

S. RES. 431

[Report No. 95–729]

RESOLUTION

To implement rule L of the Standing Rules of the Senate, relating to employment practices.

By Mr. RIBICOFF

APRIL 7 (legislative day, FEBRUARY 6), 1978

Referred to the Committee on Human Resources pursuant to section 310 of Senate Resolution 110, Ninety-fifth Congress, first session, for not to exceed 60 days